UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

NAPLETON 1050, INC. D/B/A NAPLETON CADILLAC OF LIBERTYVILLE

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

and

WILLIAM GLEN RUSSELL II, An Individual

Cases 13-CA-187272
13-CA-196991
13-CA-204377

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respectfully Submitted:

/s/ Emily O'Neill

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I. INTRODUCTION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel ("General Counsel") submits this Answering Brief to Respondent's Exceptions to Administrative Law Judge ("ALJ") David I. Goldman's April 4, 2018 Decision and Order. General Counsel relies upon the Statement of the Case and accompanying factual findings as set for in the ALJ's Decision and the record of the hearing in this matter.

II. RESPONDENT'S EXCEPTIONS RELATING TO THE TRIAL PROCEDURE (Respondent's Exceptions 7, 32, 33, and 34)

Respondent's efforts to litigate this case in a hearing *de novo* are not only unwarranted, but entirely inappropriate. Respondent's blatant mischaracterizations of the record and misplaced attacks on the integrity of the proceedings and the ALJ's impartiality[1] must be summarily dismissed as a thinly veiled attempt to wipe clean the disastrous testimony adduced by its witnesses at hearing, which can only be described as utterly incoherent at its best and fatally inconsistent at its worst. As discussed below, Respondent points to no valid basis justifying its admittedly extraordinary request for a new hearing.

First, with respect to Respondent's contention that the ALJ improperly applied his sequestration ruling to Respondent's co-counsel James Hendricks, the Board already ruled on the matter in its unpublished Order dated January 29, 2018, by finding that Respondent had failed to establish that the ALJ's ruling constituted an abuse of discretion. Respondent has produced no

[1] Having already been chided by the ALJ for attacking discriminatee William Russell's character through a series of gratuitous insults (ALJD 21: 17-18, n. 23), Respondent now takes aim at impugning the neutrality of the ALJ, yet cannot point to even a single portion of the hearing transcript that lends credible support to its contemptuous indictment.

new evidence requiring the Board to reexamine the matter and, accordingly, this issue is res judicata and must be rejected.

Second, Respondent's assertion that the ALJ improperly required Respondent, at General Counsel's request, to return copies of all pretrial affidavits of its witnesses at the conclusion of each witness's testimony is baseless. Respondent acknowledges the lack of authority for its claim that the ALJ's ruling was improper. As properly cited by the ALJ at the hearing, Section 102.118(e)(1) of the Board's Rules and Regulations instructs the provision of affidavits to the Respondent "for examination and use for the purpose of cross-examination." Tr. 96; 161-62. Respondent provided no explanation during the hearing for needing the affidavits beyond the duration of its cross-examination of each witness, nor has it shown any prejudice stemming from the ALJ's ruling. The absence of such a showing underscores the propriety of the ALJ's exercise of discretion with respect to this matter.

Finally, Respondent contends that the ALJ erred in declining to issue a subpoena sanction against General Counsel's witness Joe Schubkegel for his failure to comply with Respondent's subpoena.[2] Respondent, however, neglects to illuminate the harassing and unworkable nature of the subpoena request. The subpoena required Mr. Schubkegel to produce his toolbox, a large

[2] The irony of Respondent's request for sanctions is glaring in light of its own failure to comply with the General Counsel's subpoena request for documents relied upon by Respondent in deciding to lay-off employee David Geisler. GC Exh. 17 at para. 5. According to Respondent's defense, productivity was the linchpin of the layoff decision. Respondent witness Tony Renello testified that in reviewing Mr. Geisler's productivity, Respondent was able to determine what percentage of his work was warranty work and what percentage was customer-paid work (an important factor in assessing an individual's productivity (Tr. 45-46; 304)) by looking at "DMS" reports. Tr. 304. Because these reports were not provided to General Counsel despite its subpoena request, the ALJ ordered Respondent to provide these reports after the close of the hearing (Tr. 397-98), which it did. See GC Exh. 18. Upon review of the documents, General Counsel discovered that, contrary to Renello's testimony, the reports do not, in fact, provide a break-down of warranty vs. customer-paid work. Compare Tr. 304:3-6 with GC Exh. 18. Had Respondent timely complied with the subpoena request, General Counsel would have had the opportunity to use the reports during the hearing to cross-examine Renello and expose his unabashed misrepresentation of the critical evidence.

heavy meal cabinet weighing thousands of pounds and requiring a special tow truck to move (ALJD 31:1-6; see also GC Exh. 12), through security of the federal building in which Region 13's hearing room is located. ER Exh. 2. Even assuming that the U.S. Marshal would permit passage of such a massive piece of equipment, and further assuming that the toolbox could physically be moved through the building to the hearing room, Respondent provided a mere $54 to Mr. Schubkegel (Tr. 177-78; 183), well below the cost of a tow required to transport the toolbox. Recognizing the infeasibility of the subpoena request, the ALJ allowed Respondent and the Union to make arrangements to travel to the toolbox for inspection. Tr. 141-43; 178-79; 184-86. Additionally, Respondent had the opportunity to cross-examine Mr. Shubkegel about the damages to his toolbox and tools after its inspection, and the General Counsel provided photographic evidence of the damaged tools. GC Exh. 16. Based on the foregoing, the ALJ's accommodation to allow Respondent to inspect the toolbox in lieu of issuing sanctions over Respondent's impractical subpoena was entirely appropriate.[3]

III. RESPONDENT'S EXCEPTIONS RELATING TO ITS UNLAWFUL LAYOFF OF DAVID GEISLER

[3] Finally, in its Exception 34, Respondent excepts to the Board's decision to proceed with the instant proceedings notwithstanding the pendency of a separate unfair labor practice proceeding, renewing an argument it made prior to the hearing in its second of two Motions to Reschedule the hearing. Contrary to Respondent's contention, the charge being investigated at the time of the hearing—alleged failure to bargain in good faith and failure to reinstate its striking employees occurring on November 15—involved conduct occurring more than 3 ½ months after the latest occurring conduct at issue here and was not sufficiently related to warrant consolidated proceedings. In any event, as Respondent acknowledges, that charge was dismissed by the Region on February 23, 2018, and, accordingly, Respondent cannot show that it was prejudiced in any way by proceeding with the instant Complaint. As for Respondent's bald claim that Counsel for the General Counsel engaged in a fishing expedition in furtherance of the outstanding charge, it is notable that Respondent has provided no argument in support or otherwise showed how it was prejudiced in any way. Significantly, the brief portion of the transcript Respondent points to reveals that Respondent promptly objected to Counsel for the General Counsel's line of questioning and the General Counsel moved on. In the absence of any articulated harm, Respondent's exception must be rejected.

(Respondent's Exceptions 1, 2, 12, 13, and 21-24)

As detailed in the ALJ's decision, Respondent laid-off David Geisler on October 27, 2016—just nine days after the Union's victory and before the Board had even certified the election results. ALJD 4:29-33. The fully credited and uncontroverted testimony at hearing established that on that day, Geisler was called into Supervisor Scott Inman's office, where Inman told him he was being laid off for "lack of hours." ALJD 10:48-49. Then, the very next thing Inman said to Geisler, as Geisler stood up to leave, was that he had "asked [them] not to vote that way," an admission as candid as one could expect in a case of this nature. ALJD 11:1-2.

At the outset, it is critical to point out Respondent's egregious mischaracterization of the ALJ's analysis. The ALJ did not "specifically [find] that this was a "dual motive" case and that the Respondent had legitimate grounds for a layoff" as Respondent contends in its brief. Rather, the ALJ specifically noted that he would *assume* for purposes of analysis, without deciding, that this was a dual motive case. ALJD 23:30-33. In other words, the ALJ gave Respondent the benefit of the doubt and examined the evidence in the best light possible for Respondent. However, it is clear from the ALJ's decision that he did not, in fact, find Respondent's proffered business justification credible, nor could he in light of the glaring inconsistencies between the testimony of Respondent's witnesses who, on the whole, lacked credibility. Indeed, given the amount of contradictory and patently false testimony adduced by Respondent's witnesses, it is clear that the productivity issue and Geisler's performance were fabricated as a post-hoc justification for his layoff and, accordingly, the proper analysis was one of pretext.

With respect to the General Counsel's initial burden under the *Wright Line*[4] analysis, Respondent's entire argument against the ALJ's finding that the General Counsel sustained its burden rests on its miscomprehension of Board law. Contrary to Respondent's contentions, it is well-settled that where an employer's adverse action against individual employees is designed to chill a group of employees' union support or is in retaliation for such support, the General Counsel need not prove each individual discriminatee's union sympathies or the employer's knowledge thereof. See ALJD 18, n. 20 and cases cited therein. The ALJ's conclusion that the General Counsel's case, proving that Geisler's layoff was motivated by antiunion animus, was entirely unrebutted by Respondent is fully supported by the record. Most notably, Inman himself admitted that Respondent's decision to lay-off Geisler was the consequence of the employees' decision to unionize when he expressly linked Geisler's layoff to the vote. ALJD 22:12-16. Inman did not deny this statement at the hearing, leaving Geisler's testimony, which was credited in full (ALJD 11, n. 10) entirely uncontested. Significantly, Respondent did not except to the ALJ's credibility findings with respect to this statement.[5] Far from "tenuous," this admission provides direct evidence of the nexus between the layoff and protected activity, which Respondent erroneously claims to be absent from the ALJ's analysis.

Turning to Respondent's defense, Respondent excepts to the ALJ's finding that Respondent failed to show that Geisler would have been laid-off even in the absence of its unlawful motivations. The crux of Respondent's argument is that the ALJ overlooked evidence establishing that the decision was made well in advance of the election. The problem with Respondent's argument, of course, is that not a single one of its witnesses could provide even a

[4] 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] Indeed, the ALJ was correct to fully credit Geisler's unrebutted testimony. See, e.g. *Asarco, Inc.*, 316 NLRB 636, 640 (1995) (adverse inference warranted against party that fails to deny or elicit evidence with respect to adverse testimony from an opposing witness).

shred of credible evidence approximating when the decision had been made. Rather, the only evidence pointing toward when the decision was made shows that it occurred October 21, just three days after the election. ALJD 23: 5-8. As the ALJ correctly found, Respondent adduced no credible evidence to explain the suspicious timing of the decision, nor does it now direct the Board to any record evidence that the ALJ overlooked. ALJD 13:40-43; 22:18-22.

Even assuming, as the ALJ did without finding, that there was an issue of productivity at Respondent's facility and further assuming that Respondent had been closely monitoring productivity since it acquired the dealership in June, this alone is insufficient to overcome the General Counsel's prima facie case. It is axiomatic that it is not sufficient for an employer to simply show that its decision *could* be justified by legitimate reasons. Rather, to carry its *Wright Line* burden, the employer must establish that the legitimate reasons, standing alone, would have led to the same action. *Golden State Foods Corp.*, 340 NLRB 382, 395 (2003). In this respect, Respondent failed to provide any explanation, let alone a credible one, as to why it suddenly decided to act on its concerns over productivity—which it purportedly held for months—by implementing a layoff on the heels of the election.

As Respondent itself acknowledges, its witnesses were hopelessly vague and obtuse in their testimony, to put it mildly. In fact, the glaring inconsistencies in the testimony of Respondent's witnesses Michael Jopes, Scott Inman, and Tony Renello with respect to the layoff decision rendered them so devoid of any credibility that the only reasonable conclusion is that their proffered reasons were nothing more than fabricated post-hoc explanations for the layoff. The examples of their contradictory testimony are legion, but a few highlights are detailed below.

For one, Jopes and Renello directly contradicted each other when describing what steps they took before ultimately deciding that layoffs were necessary. For example, Jopes testified that

Respondent cut down on advertising costs because its predecessor, Weil Cadillac, had been investing more than what Napleton Automotive Group normally spent. Tr. 353-54. Conversely, Renello testified that they brought advertising levels *up* to $3,000 a month because Weil Cadillac had not been spending *any* money on advertising. Tr. 261.

Next, Respondent's witnesses testified that they addressed productivity issues with their mechanics in an effort to help them to improve, yet when pressed for details, their testimony fell apart and revealed otherwise. Tr. 237-38; 410. Fixed Operations Director Renello, in particular, was adamant that layoff was not an easy decision and, in fact, was a last resort. As such, he testified that he always tries to work with individuals to identify the reasons for productivity issues and to help them improve first. Tr. 238. He specifically testified that six to eight months is a reasonable length of time to give a mechanic to improve. Tr. 309-10. Such a length of time would have been particularly appropriate in this case, where Respondent's acquisition of the dealership brought with it a new set of heightened expectations and goals with respect to productivity. Tr. 406. As Inman testified, it was expected that the mechanics would need time to adjust to these new expectations. Tr. 406; 417-18. Yet, the layoff occurred just four months after Respondent acquired the dealership.

Not only did the layoff occur in a much shorter length of time than Renello customarily provided mechanics to improve, it also occurred with no prior warning or indication that Geisler or any of the other mechanics needed to improve their productivity. Tr. 39; 47. The purported consensus among managers Michael Jopes, Tony Renello, and Scott Inman was that productivity was low among *all* of the mechanics, such that none of the mechanics were meeting Respondent's expectations, and that this had been an issue since Respondent acquired the dealership in June 2016. Tr. 236; 241; 266-67; 306; 359; 406; 417-18. As noted above, when asked what the Employer did to try to improve productivity, Inman and Renello testified that

Inman had individual meetings with the mechanics to work with them to improve their productivity. Tr. 237-38; 410. However, Inman's subsequent testimony revealed that this was a lie. Thus, neither he nor Renello could recall a single conversation with any mechanic regarding productivity. Inman was evasive when pressed for specifics until he finally admitted that he had not, in fact, had such conversations, contradicting his and Renello's earlier testimony. Tr. 410; 440-42. Meanwhile, Geisler credibly maintained that Inman had only casually mentioned productivity with him and other technicians in passing during smoke breaks, before Respondent had even acquired the dealership. ALJD 12:4-5; Tr. 39; 47. The only explanation for the inconsistent testimony and Renello's apparent departure from his standard practice regarding productivity issues was that the layoff was not, in fact, previously contemplated before the election and the reason that October 21 is the earliest documented date of the decision is because that decision was motivated by the election results, not productivity.

Respondent also points out that Inman called Geisler two months after the layoff to ask if he would be interested in returning.[6] Tr. 427. Rather than undercut any inference of discriminatory motive as Respondent suggests, it actually underscores the pretextual nature of Respondent's proffered reason for the layoff. Thus, Respondent has consistently framed its purported productivity issues and, in turn, the layoff decision, in terms of the fact that none of the mechanics were meeting the expected threshold of 40 booked service hours a week. Tr. 235-36. Thus it is significant that at the time Inman called Geisler about returning to work, Respondent's mechanics were still not meeting this expectation. Tr. 307. That Respondent contemplated returning Geisler to work despite the fact that the productivity issues had still not improved directly refutes Respondent's contention that productivity was the basis for Geisler's layoff.

[6] General Counsel does not concede, nor should it be deemed, that this call was sufficient to constitute a bona fide offer to return to work so as to toll the backpay period at the compliance stage of proceedings.

Finally, Respondent excepts to the ALJ's failure to account for the fact that Respondent purportedly laid-off two other employees at the same time as Geisler. Quite simply, the scant evidence on this subject did not warrant any serious consideration. Thus, the sole reference suggesting that other layoffs took place is the following testimony from witness Tony Renello:

> Q: Did you layoff other employees at Libertyville Cadillac around the same time?
>
> Renello: I believe we lost a body shop manager and I also believe we laid off the administrative person for the rental cars.
>
> ALJ: What was their name, do you know?
>
> Renello: I'm sorry, Judge, I don't.

(Tr. 243:14-25) This equivocal testimony by Renello is far from conclusive evidence that additional layoffs were undertaken at the same time; at most it *suggests* that one additional layoff possibly occurred. Accordingly, the ALJ committed no error in omitting this evidence from his analysis.

For the foregoing reasons, Respondent's exceptions relating to its unlawful layoff of David Geisler should be rejected.

IV. RESPONDENT'S EXCEPTIONS RELATING TO ITS UNLAWFUL TERMINATION OF WILLIAM RUSSELL

(Respondent's Exceptions 1-3, 8-12, 14-20, and 25)

As set forth more fully in the ALJ's decision, Respondent's termination of William Russell paralleled Geisler's layoff in several respects. It occurred on the same day, October 27, 2016, just nine days after the election and without any explanation for the suspicious timing. Also, in nearly identical fashion to his layoff discussion with Geisler, Inman all but explicitly informed Russell that the decision to terminate him was a result of Respondent's employees' decision to unionize. ALJD 19:37-40. Specifically, during their first conversation following

Russell's discharge, Inman expressed his apologies for the termination, noting that it was out of his hands given "everything that had happened," referring, in no uncertain terms, to the Union and its selection by Respondent's employees as their bargaining representative. Tr. 89. Any potential ambiguity as to what Inman meant by "everything that happened" was promptly eliminated when at that moment, technician William "Bill" Oberg, who would later become the Union's strike captain, walked by, providing Inman with the perfect opportunity to illuminate his previous statement. Tr. 89; 134. Referring to Oberg, Inman stated, "That's the guy who started all this." Tr. 89. There being no doubt in his mind that Inman was referring to the Union, Russell told Inman, "If you think Bill did that, there was other people who got the union in here. It wasn't Bill. And if you're going after Bill, you're going after the wrong person." Id. Inman simply responded, "Really?" thereby affirming Russell's understanding that Inman had been talking about the Union. Id. Significantly, Inman did not deny these statements during his testimony at hearing and, in fact, was not even questioned on the matter by Respondent's Counsel.[7] Accordingly, the ALJ was correct to fully credit Russell's unrebutted testimony. See, e.g. *Asarco, Inc*., 316 NLRB 636, 640 (1995) (adverse inference warranted against party that fails to deny or elicit evidence with respect to adverse testimony from an opposing witness).

[7] Respondent excepts to the ALJ's conclusion that Inman's identification of Oberg as "the guy who started this all" created an impression of surveillance in violation of Section 8(a)(1). (ALJD 24:43-52; Respondent's Exceptions 25) As detailed above, the entirety of their conversation makes it abundantly clear that Inman was referring to the Union and, accordingly, the statement was not ambiguous, as claimed by Respondent. In light of the technicians' efforts to maintain a level of secrecy surrounding their organizing efforts while at the facility, and given that most of the organizing activity took place off premises when the technicians met with each other and the Union at their homes and in restaurants (Tr. 32-33), Inman's comment identifying Oberg as the technician responsible for starting the effort would have reasonably led employees to assume that their union activity had been placed under surveillance and, accordingly, this exception should be rejected. See *The Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1081 (2004) (among other factors in analyzing whether a statement unlawfully creates the impression of surveillance, the Board considers the extent to which employees have been open about their union activities and whether the activities have been conducted off the employer's premises).

Inman's unmistakable reference to the Union as an explanation for Russell's termination is conclusive evidence of Respondent's unlawful motive.

With respect to the ALJ's findings concerning the unlawful discharge of William Russell, Respondent devotes significant argument to undercutting the ALJ's credibility findings with respect to Russell's testimony and, specifically, to his August 23 conversation with Inman regarding the Union. See ALJD 6:30-37. Respondent's arguments fail for several reasons.

First, Respondent's contention that the ALJ erred in declining to draw an adverse inference from General Counsel's failure to call Russell's wife, to corroborate the August 23 conversation for which she was present is misplaced. Respondent's speculation that "Mrs. Russell is peculiarly in the power" of the General Counsel improperly presumes Mrs. Russell's availability to testify. Notably, Mrs. Russell, who, as Respondent is well aware, has suffered from serious chronic medical issues, was not even present for the hearing. Tr. 203-04. Even assuming the availability of Mrs. Russell, Respondent's argument does not account for the tactical considerations that go into General Counsel's decision to offer her as a witness. In this respect, Respondent's argument overstates the amount of weight that a spouse's testimony, who is not an employee and, accordingly, would have little to risk by adversely testifying against an employer, would reasonably be afforded. Finally, and most critically, the lack of testimony from Mrs. Russell does not refute the sound bases relied upon by the ALJ for crediting Russell in full, while finding Respondent's witnesses Inman and Soffietti wholly lacking in credibility. ALJD 8:32-9:9; 8 at n. 9. In short, Respondent has presented no argument that would justify setting aside the ALJ's credibility findings with respect to Russell's testimony.[8]

[8] The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Second, Respondent's emphasis on this conversation is, once again, the result of its misunderstanding of the General Counsel's theory, supported by settled Board law, which is that Russell's termination was undertaken in response to the unit's decision to vote in favor of unionization, and not necessarily his individual union activity. Nonetheless, even setting aside this conversation, Russell's union support was known to Inman inasmuch as Russell told Inman that he attended a union meeting (ALJD 6:2428) and Inman was aware that Russell voted in the election (ALJD 7:13-20).

Finally, the ALJ properly credited Russell's testimony regarding this August 23 conversation over Soffietti's denial that the topic of the Union came up. ALJD 9:1-9. Critically, Soffietti admitted that he was working with his back turned to Inman and Russell, rather than paying attention to the conversation.[9] Tr. 208-11. To the extent he did participate in conversation, which he admitted was intermittently, he only spoke to Russell's wife and "wasn't paying attention to what Scott [Inman] was saying." Tr. 211. Indeed, Soffietti could not recall any details with respect to the conversation between Russell and Inman, rendering his testimony on the matter entirely unreliable. Id. For these reasons, the ALJ was in his decision correct to credit Russell over Soffietti.

Next Respondent argues that the ALJ's finding that Russell was an employee of Respondent is unsupported by the record evidence. This contention could not be further from the truth as General Counsel presented ample evidence showing employee status. Respondent sole argument for this baseless contention is its unfounded assertion that the record provided no support for the ALJ's finding that Respondent hired its predecessor's mechanics without

[9] Respondent's assertion that Soffietti is a "neutral witness" is confounding. Soffietti is an admitted shop foreman for Respondent whose duties include assigning or dispatching work and overseeing labor operations, and, accordingly, is clearly a supervisor of Respondent under Section 2(11) of the Act. Tr. 199-200; 208.

requiring an application or other affirmative steps. In fact, the record fully supports this finding. Tr. 28:22-29:15.

Notably, Respondent takes no issue with the multitude of other evidence relied upon by the ALJ to support his finding that Russell was an employee, including that Russell's name remained on the weekly work logs while he was out on workers' compensation (GC Exh. 10 at 6-11); that his tools remained at the facility throughout this time until his termination (Tr. 70; 474-75); that Russell was instructed to keep Respondent apprised of his workplace injury and expected return-to-work date (Tr. 68-69); that Russell visited the facility every four weeks for that purpose (Id.); that Inman repeatedly asked Russell when he would be returning (Tr. 73; 86-87); that Russell and his family members' names very prominently appeared on the one-page insurance invoices that were reviewed on a monthly basis (GX Exh. 15); and that he was specifically instructed by two managers to attend an August 4, 2016, meeting at the facility concerning health insurance benefits, and further instructed to complete paperwork relating to such benefits. Tr. 74-75; GC Exh. 6.

In short, Respondent has asserted no legitimate basis for disturbing the ALJ's findings and legal conclusions concerning the unlawful layoff of William Russell and, therefore, its exceptions should be rejected.

V. RESPONDENT'S EXCEPTIONS RELATING TO ITS UNLAWFUL REMOVAL OF EMPLOYEE TOOLBOXES

(Respondent's Exceptions 4 and 26-30)

The ALJ found that by letter dated August 1, 2016, Respondent unlawfully ordered its mechanics to remove their tools from its premises, and subsequently physically removed their toolboxes to its outside driveway, in retaliation for their decision to strike. Indeed, as the ALJ found, Respondent actually admitted its unlawful motivations for its actions. ALJD 27:9-15.

In its exceptions, Respondent excepts to the ALJ's finding that Respondent failed to put forth any credible legitimate justification to counter its admission of unlawful motive. In support of its exception, Respondent argues that its insistence on removing the toolboxes was justified by its insurance policy and its need to make room for striker replacements. The ALJ's rejection of such specious arguments was proper and must be upheld.

Respondent's defense that its insurance policy did not cover the toolboxes and, therefore, that it did not want to be liable for the toolboxes fails for several reasons. First, this reasoning is inconsistent with Respondent's practice concerning the toolboxes of Geisler and Russell. In this respect, after Geisler was laid-off, he left his tools on Respondent's premises for two weeks, until he made arrangements with his subsequent employer to move them. Tr. 51. During this time, Geisler was not instructed to move his tools, nor did he have to ask for special permission to store them at Respondent's facility. Id. Respondent also admits that Russell kept his tools at the facility throughout the time he was on workers' compensation up until his discharge—from February through October 2016. Tr. 474-75. At no point was Russell instructed to move his tools, despite Respondent's purported belief that he was not an employee and despite the fact that he hadn't performed work for months. Id.; Tr. 70. Finally, as Respondent admitted, its insurance policy extended to property not just within the four walls of its facility, but also to the outside perimeter of its property. Tr. 348; 65. Thus, moving the toolboxes outside in an effort to avoid liability accomplished nothing as it would have had no effect on the question of insurance coverage.

Next, Respondent implies on page14 of its brief that it was necessary to remove the toolboxes in order to make room for the striker replacements' toolboxes. This too is a transparently specious argument. First, the testimony is devoid of any reference to such a defense. Second, as Respondent acknowledges, Napleton Automotive Group owns at least six

other dealerships which were struck on the very same day and yet, Respondent did not remove any of the toolboxes of its striking technicians at those locations, although presumably those locations hired striker replacements as well. Tr. 314. Third, it is undisputed that the Union agreed to move the toolboxes by August 4. The first striker replacements were not hired until at least a week later. Tr. 368-69. Thus, there was no need to make room as of August 3, when Respondent removed the toolboxes.

In short, Respondent's asserted business justifications for ordering the removal of the toolboxes and physically moving them out a day before the agreed-upon date were clearly pretextual and, therefore, support the ALJ's conclusion that the real reason for its actions was to punish the technicians for exercising their Section 7 right to strike. Respondent's exceptions relating to the ALJ's findings and conclusions should be rejected.

VI. RESPONDENT'S EXCEPTIONS RELATING TO ITS UNLAWFUL AUGUST 1 THREAT OF JOB LOSS

(Respondent's Exceptions 5, 6, and 31)

As the ALJ found, the same August 1 letter that unlawfully directed the striking mechanics to remove their tools as a consequence of their decision to strike also contained an unlawful threat of job loss. ALJD 31:12-15. Specifically, the ALJ found that in the absence of a claim that any replacements would be permanent, the following portion of the letter constituted a threat not to replace strikers at the strike's end and, accordingly, an implied threat of job loss that was inconsistent with the strikers' reinstatement rights:

> We have placed ads for replacement technicians. If and when you are replaced, you will be notified. After you are replaced, should you make an unconditional offer to return to work you will be placed on a preferential hire list should an opening occur.

The ALJ's analysis is soundly supported by settled Board precedent and should not be disturbed. Thus, as the ALJ concluded, Respondent's omission of any indication that any striker replacements would be permanent left intact the presumption that they would be temporary and, accordingly, the strikers would be entitled to reinstatement at the strike's end. See *Hansen Bros. Enterprises*, 279 NLRB 741, 741 (1986).[10]

Respondent's argument for overruling the ALJ's conclusion focuses entirely on the ALJ's alternative analysis—that is, that even if the above-cited language in the August 1 letter was ambiguous with respect to the status of the striker replacements, it was still unlawful. In other words, the Board need not even reach Respondent's exception unless it disagrees with the ALJ that the language was not ambiguous in the first place.

Turning to Respondent's argument, in urging the Board to overrule the ALJ's conclusion, Respondent correctly cites to this precedent, but relies on a portion that is inapposite here. Thus, while *Unifirst Corp.* provides that the Board's policy is to resolve any "ambiguity occasioned by a failure to articulate employees' continued employment rights when informing them about permanent replacement in the context of an economic strike," it also makes clear that where, as here, "ambiguous comments about striker replacement are part and parcel of a threat of retaliation for choosing representation . . . any ambiguity should be resolved against the employer." 335 NLRB 706, 707 (2001). Under this precedent, even assuming that Respondent's statement regarding striker replacements could be considered ambiguous, because it was accompanied by an unlawful directive to remove their toolboxes from the facility (i.e. a

[10] The issue of whether Respondent subjectively deemed the eventual striker replacements permanent is a red herring inasmuch as the issue is what Respondent communicated to its employees and whether that communication constituted a misstatement of their rights under *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). See *Eagle Comtronics*, 263 NLRB 515, 515-16 (1983) (while an employer is not obligated to "explicate all the consequences of being an economic striker," its "statements on job status after a strike [must be] consistent with the law.").

threatened consequences of the strike), and promptly followed by the unlawful removal of such toolboxes at the hands of Respondent, the ALJ was correct to resolve the ambiguity against Respondent under *Unifirst Corp.* Based on the foregoing, Respondent's exceptions related to the August 1 threat and its removal of tools should be rejected.

VII. CONCLUSION

Based on the foregoing, it is respectfully submitted that Respondent's Exceptions to the Decision of the ALJ are without merit and must be rejected in their entirety.

Dated: May 15, 2018 at Chicago, IL

Respectfully Submitted,

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I, the undersigned employee of the National Labor Relations Board, affirm that on May 15, 2018, I served the above-entitled document(s) by **electronic mail,** as noted below, upon the following persons, addressed to them at the following addresses:

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